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By Email & Overnight Courier
Mary L. Cottrell, Secretary
Department of Telecommunications and Energy
Commonwealth of Massachusetts
One South Station
Boston, MA 02110

Re: ***D.T.E. 98-57 Phase III***

Dear Ms. Cottrell:

Pursuant to the June 10, 2002 Procedural Memorandum issued by Hearing Officer Reyes, WorldCom, Inc. hereby submits its comments in response to the questions raised by the Department regarding the impact of the D.C. Circuit's decision in *U.S.Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir 2002), on the Department's investigation in this proceeding.

1. What is the effect of the D.C. Circuit Court's ruling in U.S. Telecom Ass'n v. FCC on this proceeding?

Answering this question first entails correcting a misstatement in the Department's Procedural Memorandum. Specifically, the Procedural Memorandum states that the Court in *USTA* "vacated and remanded" the FCC's *UNE Remand Order*[1] and *Line Sharing Order*.[2] That is incorrect. The D.C. Circuit did *not* vacate the *UNE Remand Order*, and until the Court issues its

[1] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999) ("*UNE Remand Order*"). The Court in *USTA* refers to the *UNE Remand Order* as the "Local Competition Order."

[2] *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, FCC 99-355 (rel. Dec. 9, 1999) ("*Line Sharing Order*").

mandate (expected some time after July 8, 2002), it is unclear as to whether it vacated the *Line Sharing Order*. While the Court did state in the text of its decision that the *Line Sharing Order* "must be vacated and remanded," nowhere in the text does the Court suggest that the *UNE Remand Order* is, or should be, vacated. Moreover, the ordering clause at the end of the decision suggests that *neither* order is vacated, stating only as follows:

> We grant the petitions for review, and remand both the *Line Sharing Order* and the [*UNE Remand Order*] to the Commission for further consideration in accordance with the principles outlined above.

With that clarification, the response to the Department's first question, insofar as Verizon's packet switching obligations are concerned, is that *USTA* has no effect whatsoever on this proceeding. The Department has stated that "the FCC's rules on unbundling packet switching promulgated in the *UNE Remand Order* would guide the Department's investigation in this proceeding."[3] Because the Court in *USTA* did not vacate these rules, they are the law of the land and remain fully in effect unless and until they are changed.

The *USTA* decision also has no immediate effect insofar as Verizon's line sharing obligations are concerned, whether or not the *Line Sharing Order* is vacated by the Court in its yet-to-be-issued mandate. Paragraph 39 of the Bell Atlantic/GTE merger conditions unequivocally requires Verizon to continue to abide by the terms of the *Line Sharing Order* (*i.e.*, to continue to make line sharing available) "until the date of a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by Bell Atlantic/GTE in the relevant geographic area."[4] This condition is mirrored in the FCC's order approving the Bell Atlantic/GTE merger, with language addressing precisely the current procedural posture of the *USTA* case:

> In order to reduce uncertainty to competing carriers from litigation that may arise in response to our orders in the UNE Remand and Line Sharing proceedings, from now until the date on which the Commission's orders in those proceedings, and any subsequent proceedings, become final and non-appealable, Bell Atlantic and GTE will continue to make available to telecommunications carriers, in accordance with those orders, each UNE and combination of UNEs that is required under those orders, until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide the UNE or combination of UNEs in all or a portion of its operating territory. ***This condition only would have practical***

3 Procedural Memorandum at 1 (citing D.T.E. 98-57 Phase III Order (September 29, 2001) at 87-88).

4 The Bell Atlantic/GTE merger conditions are available on the FCC's website at: http://www.fcc.gov/Bureaus/Common_Carrier/Orders/2000/fcc00221b.doc.

> ***effect in the event that our rules adopted in the UNE Remand and Line Sharing proceedings are stayed or vacated*.**

Bell Atlantic/GTE Merger Order, ¶316 (emphasis added).[5] These merger conditions sunset thirty-six months after the Bell Atlantic/GTE merger closed, or June 2003. Thus, Verizon is under a continuing obligation to provide line sharing until the FCC issues its order on remand (in the Triennial Review) and until that remand order becomes final and non-appealable. Moreover, the FCC has stated unequivocally that "[w]hile we continue to evaluate the Court's opinion and consider all the Commission's options, in the meantime, the current state of affairs for access to network elements remains intact."[6] Accordingly, Verizon has a continuing obligation to provide line sharing.

Moreover, even if Verizon were not required to provide line sharing pursuant to the *Bell Atlantic/GTE Merger Order,* the Department would still have cause to proceed with its investigation. First, the *USTA* decision cannot become effective until the D.C. Circuit issues its mandate, which, in all likelihood, will not occur until after July 8, 2002.[7] Indeed, the decision may not become effective on July 8, 2002 because parties to the Court's Judgment may seek rehearing, which automatically "stays the mandate until disposition of the petition or motion."[8] Likewise, the FCC may, and if not, parties to the proceeding may, seek Supreme Court review. Parties have 90 days from the date of the Court's Judgment, or 90 days from the denial of a petition for rehearing in which to seek *certiorari* before the United States Supreme Court.[9] Finally, the FCC may, and if not, parties to the proceeding may seek a stay of the mandate pending Supreme Court review.

Second, states continue to have the authority to require unbundling of elements beyond the minimum list the FCC has established. The *USTA* decision has no impact whatsoever on the existence of this state authority, and, if anything, this decision confirms state power by leaving undisturbed existing rules allowing states to unbundle elements beyond those ordered by the FCC. State authority in this regard stems directly from the 1996 Act. Congress expressly provided that the

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5 *In Re Application Of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, FCC 00-221 (rel. June 16, 2000) (Bell Atlantic/GTE Merger Order), ¶ 316.

6 Statement of Chairman Michael Powell, available at www.fcc.gov/Speeches/Powell/Statements/2002/stmkp212.html.

7 Federal Rule of Appellate Procedure 41(b) provides: "The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, rehearing en banc, or motion for stay of mandate, whichever is later." Federal Rule of Appellate Procedure 40(a)(1) provides: "a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time." Accordingly, because a U.S. agency, the FCC, is a party to the D.C. Circuit's judgment, the parties have 45 days to file a petition for rehearing. The D.C. Circuit's Opinion was issued on May 24, 2002.

8 FED. R. APP. PROC. 41(d)(1).

9 U.S. SUP. CT. R. 13.1 and 13.3.

FCC "shall not preclude the enforcement of any regulation, order or policy of a State commission that – (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part." 47 U.S.C. § 251(d)(3). Similarly, Congress dictated in Section 261 of the 1996 Act that "[n]othing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part." 47 U.S.C. § 261(c).

Consistent with these directives, the FCC's unbundling rules expressly permit a state commission to unbundle additional elements, as long as the state commission complies with the standards in rule 317. *See* 47 C.F.R. § 51.317(b)(4); *see also AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999) (noting that carriers can request access to additional elements from state commissions); *UNE Remand Order*, ¶¶ 153-154 (same); *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15,499, ¶ 244 (1996) (*"Local Competition Order")*. Thus, the FCC list of unbundled elements is a *minimum* list that states can add to, but not subtract from.

2. Should the Department proceed with its investigation or wait for the FCC to address packet switching in its Triennial Review?

The Department should continue with its investigation. The next round of comments due in connection with the FCC's Triennial Review are due by July 17, 2002, and a final decision is not expected from the FCC until the end of this year or early next year. In the meantime, Verizon has announced that it intends to deploy DSL capability in at least one Massachusetts central office later this year. The entire premise for the Department's investigation is that "it would be fundamentally unfair to CLECs, and to consumers, to allow [Verizon] . . . to deploy the technology that would allow plug and play, or to deploy the 'infrastructure to support wholesale packet transport services from [Verizon's] RTs' and only then file with the Department a proposed tariff offering for CLECs to do the same."[10] Verizon is obviously not awaiting the outcome of the Triennial Review to proceed with its deployment of integrated DSL capabilities at remote terminals. Neither should the Department await the conclusion of the Triennial Review. Rather, it should continue expeditiously with its investigation to prevent Verizon from achieving an unfair advantage in the marketplace.

Further delay in resolution of these issues, which have been before the Department for nearly two years, will stifle competition in Massachusetts and unfairly impact competitors like WorldCom. WorldCom provides DSL service to ISPs and businesses in Massachusetts. Utilizing assets acquired from Rhythms in December 2001, WorldCom is providing DSL service, including line

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[10] D.T.E. 98-57 Phase III (September 29, 2002) at 86.

sharing, in the Boston area. Due to Verizon's deployment of fiber, WorldCom is not able to service all customers who desire our innovative service offerings.

Finally, it is also worth noting that the Department decided to proceed with its UNE rate investigation in D.T.E. 01-20 notwithstanding the cloud of "regulatory uncertainty" that had hung over the FCC's TELRIC methodology prior to the recent Supreme Court decision in *Verizon Communications, Inc. v. FCC*, 122 S.Ct. 1646 (2002).[11] As described above, Verizon's *continuing* obligations under both the *UNE Remand Order* and the *BA/GTE Merger Order* negate, at least in the near term, the "regulatory uncertainty" surrounding incumbent LEC unbundling and line sharing obligations. There is no reason for the Department to change here the approach that it took in the UNE rate case.

3. If the Department proceeds, what is appropriate standard of review and analysis required?

The short answer is: The same standard of review and analysis the Department had planned to undertake prior to the *USTA* decision; as demonstrated above, the applicability of the FCC's rules to Verizon has not been altered by virtue of *USTA*, and the Department maintains the power to unbundle UNEs in addition to those required to be unbundled by the FCC.

As for the long answer, the starting point for determining what standard applies to the unbundling analysis is the 1996 Act itself: Section 251 requires only that state commissions act consistently with the requirements of that section (*i.e.*, the pro-competitive unbundling requirements), and do not "substantially prevent implementation of the requirements" of section 251 or its pro-competitive purposes. 47 U.S.C. § 251(d)(3). Unless and until the FCC were to declare that either line sharing or access to packet switching capability in all circumstances in all regions would affirmatively *violate* section 251 law – a preposterous conclusion – a state decision unbundling line sharing or packet switching capability could not and would not violate the pro-competitive requirements or purpose of that section. As the Supreme Court recently held, the very purpose of the 1996 Act was "to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property," and competitors must therefore be placed "on an equal footing with the incumbent." *Verizon*, 122 S. Ct. at 1661.

Rule 317 provides for unbundling of an element if access to the element is "necessary," in the case of a proprietary element, or lack of access to the element would "impair" the new entrant's ability to provide the service it seeks to offer, in the case of a non-proprietary element. 47 C.F.R. § 51.317(a), (b). A network element is "necessary" if, taking into consideration the availability of

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[11] *See Vote and Order*, D.T.E. 01-20 (Jan. 4, 2001) ("The Department has determined that, pending a FCC ruling on remand of its pricing rules or a higher court ruling overturning the Eighth Circuit's findings, it will maintain the status quo for UNE prices . . . . The status quo in Massachusetts is use of the FCC's TELRIC . . . method[], and despite regulatory uncertainty surrounding it, TELRIC . . . [is] the only viable method[] to rely upon at this time").

alternate elements outside the incumbent LEC's network, including self-provisioning by the new entrant or acquiring an alternative from a third-party supplier, lack of access to that element precludes the new entrant from providing the services that it seeks to offer. *Id*. § 51.317(a)(1). The standard for impairment is similar except rather than require that lack of access "preclude" the new entrant from providing services (a higher standard), the impairment standard requires only that lack of access to the element "materially diminish" the new entrant's ability to provide the services it seeks to offer. *Id.* § 51.317(b)(1). In applying this standard, the FCC and state commissions are to consider the "totality of circumstances" to determine whether an alternative to the incumbent LEC's network element is available as a "practical economic, and operational matter" such that a new entrant could use the alternative to provide service. *See id.* §§ 51.317(b)(1) and (2).[12] In determining whether to require the unbundling of any network element, the FCC and state commissions are also permitted to consider a number of specified factors such as whether unbundling of a network element promotes the rapid introduction of competition or promotes facilities-based competition, investment, and innovation. *See id.* § 51.317(b)(3).

Likewise for packet switching in particular, the FCC's unbundling rules may continue to "guide the Department's investigation in this proceeding." However, as noted above, the Department also maintains the power to unbundle elements beyond those identified by the FCC, and therefore is free to permit access to the packet switching UNE in a manner that is less restrictive than the conditions imposed by the FCC (s*ee* 47 C.F.R. §51.319(c)(3)(B)), so long the Department is consistent with the FCC's unbundling rules (47 C.F.R. §51.317) in doing so.

4. Is the current record in this proceeding sufficient to support the type of analysis now required under the "impair" standard? If not, what is the scope of the evidence that must be developed?

As discussed above, Verizon's obligations with respect to line sharing and packet switching are the same today as they were prior to the issuance of the *USTA* decision. As such, the Department's question contains an erroneous premise, *i.e.*, that "the type of analysis now required under the 'impair' standard" is in some respect different than it was before the Court ruled. Because the evidentiary record in this proceeding has been developed under a standard of review that remains in effect, there is no need to develop additional evidence for the purpose of satisfying a standard that is *not* in effect.

However, should the Department choose to consider the *USTA* factors at this time, those factors can be addressed expeditiously, as most *do not even apply to line sharing or packet*

12 The FCC's rules set out a number of factors that the FCC or a state commission is to consider in reaching this determination, including: (i) whether obtaining the element outside the incumbent's network involves "materially higher" costs, (ii) whether the element is available ubiquitously or only in select locations, (iii) the quality of the alternative, (iv) the timeliness with which the element can be provided to a requesting carrier, and (v) whether operational impediments render the alternative impracticable. *UNE Remand Order* ¶¶ 23, 62-100; *see also* 47 C.F.R. § 51.317(b)(2).

switching. The one issue in *USTA* that is specific to line sharing – the supposed impact of intermodal competition – can be readily addressed.

In the *USTA* decision, the Court directed the FCC to re-examine several issues pertaining to UNEs generally, and one issue relating specifically to line sharing. As to line sharing, the Court instructed the FCC to consider the relevance of intermodal competition. As to UNEs more generally, the court directed the FCC to consider issues such as the incumbent LECs' retail rate structure, economies of scale, and a more localized geographic focus for purposes of the impairment analysis.

A. Intermodal Competition and Competitive Impact

If the Department chooses to address the issue of intermodal competition, it should focus on the following: (i) the existence, extent and efficacy of cable alternatives for business customers; (ii) the number of residential customers who today have a choice between cable and DSL; and (iii) where there is a viable choice between cable and DSL, whether the public interest, the pro-competitive polices of the 1996 Act, and the Department's obligations under Massachusetts law are served by protecting a duopoly from competition. WorldCom is confident that such an analysis will confirm that competitive carriers cannot obtain the facilities they need to provide broadband service from any provider other than the incumbent LECs. The market for broadband services is not competitive. Because Verizon does not yet offer business-grade DSL, business customers can obtain those services only from CLECs,[13] and many residential customers live in markets where they have at most a single broadband supplier. Wireless and satellite facilities simply are not sufficiently widespread to be available to end users, let alone competitors, in the vast majority of markets. Even where both cable modem service and DSL are provided, the public interest is not served by a duopoly in which a cable provider and an incumbent LEC retain market power.[14]

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13 Cable modem service is inadequate for most business customers. Cable-based high-speed Internet access is rarely available to business customers, and suffers from several problems that will likely continue to hinder its deployment. For example, cable modem equipment is still largely unavailable for business networks, and cable providers continue to have only limited success in gaining access to multi-tenant environments (typically found in commercial settings).

Even if cable modem service were to become widely available for business use, it still would make a poor choice for most businesses. Among other problems, its shared bandwidth architecture often causes cable modem service to lose signal strength during peak times and to pose security risks unacceptable to business customers.

14 It is neither feasible nor reasonable to require competitors to lease a second loop to provide voice compatible DSL-based services. Leasing a second loop is not possible in cases in which the incumbent LEC has only a single loop available to an end-user premise. Even where a second loop could be leased, doing so would place competitive carriers at an untenable disadvantage: CLECs would be limited to offering their data services over second lines, while the incumbent LECs would be free to offer consumers DSL over the end user's existing voice line. This

Line sharing clearly is consistent with "the goals of the Act": there is insufficient competition for broadband services, and competitive carriers have no access to broadband elements outside the incumbent's network. Far from discouraging CLEC investment in facilities, line sharing has spurred competitive carriers to invest in substantial facilities throughout the nation, including DSLAMs, splitters, packet switching, and transport. WorldCom, for instance, has purchased significant facilities in over 700 central offices across the country (including Massachusetts) to take advantage of the opportunities line sharing provides.

Moreover, line sharing is the only feasible way to erode the market power that incumbent LECs and cable companies currently exercise in the provision of broadband services, and to bring the resulting benefits of competition to consumers. In the absence of line sharing, the large economies of scale in wireline and cable networks and significant costs of expansion will prevent most competitors from entering the broadband market. By contrast, requiring incumbent LECs to unbundle the high-frequency portion of the loop allows competitive carriers to enter the market, and broadband consumers to enjoy the same kind of benefits that wireless customers gained after PCS entry, such as lower prices, more innovation, and better service.

Thus, the Department may opt to expend resources on investigating the existence, extent and efficacy of intermodal competition, but it will not change the undeniable fact that lack of unbundled access to the high frequency portion of the loop impairs competitive carriers.

B. Impairment Factors Not Specific to Line Sharing

With respect to the *USTA* Court's discussion of unbundling factors applicable to UNEs more generally, the most important point to note is that many of these factors have little or no bearing on line sharing or the unbundling of packet switching. Issues such as retail rate structure and subsidies, for example, are not relevant to line sharing or packet switching. DSL rates are not part of a system of implicit subsidy. Similarly, issues of economies of scale do not require in depth analysis as there is no serious dispute that competitors cannot economically duplicate the loop infrastructure throughout Massachusetts. As to geographic granularity, the *USTA* Court's concern should have little, if any, relevance to unbundling either the high frequency portion of the loop or packet switching. With respect to line sharing, the Court did not even suggest that monopoly loop facilities should be treated on a more granular basis; the packet switching UNE relies on a specially equipped segment of those same monopoly loop facilities. Verizon has connectivity to virtually every building in the Commonwealth. The scope and scale of that reach cannot realistically be duplicated by any competitor.

If, however, the Department were to consider the impairment analysis as applicable to loops in Massachusetts, such an analysis would necessarily be more granular than the FCC's national

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would essentially leave the incumbent LECs as the only carriers capable of providing consumers with the single-line voice/data package they demand.

focus, and would thus be consistent with the *USTA* decision. Although it is unnecessary to do so, the Department can readily address the few *USTA* factors that may be more relevant to line sharing and the unbundling of packet switching.

i. "Material" Cost Disadvantages

The *USTA* Court discussed whether a cost disadvantage is "material" if it is a typical cost shared by any new entrant in an industry. If the Department decides to analyze the issue, it can do so by distinguishing between typical costs a new entrant faces in any industry (such as advertising costs), and costs that CLECs face in local telecommunication markets (such as sunk costs in fiber – an asset that cannot be moved from place to place to meet changing customer demand). If the Department analyzes these cost disparities, it should examine the impact of the Verizon's existing and extensive local distribution networks, which new entrants cannot duplicate, at least before building a massive customer base. The Department could inquire whether the local telecommunications market is different from most industries because of the enormous economies of scale enjoyed by Verizon and the large sunk costs and substantial up-front investments needed to achieve that scale. Similarly, barriers to entry in the local telecommunications market – such as securing rights of way and building access – are far higher than in many other industries. The Department must therefore take care not to presume that the enormous cost disadvantages faced by CLECs are typical of new entrants in any industry.

ii. Geographic Granularity

The D.C. Circuit suggested in *USTA* that the FCC should consider whether the impairment analysis should be conducted on a more localized basis for some or all elements. It did not, however, direct that a localized analysis be conducted for any particular element; it simply stated that the FCC should consider the issue and explain its reasoning. The court nowhere suggested that such an analysis must be conducted for loops, and it did not hold that the many reasons for national rules must be disregarded as part of the equation. Should the Department consider the issue, it should not lose sight of the compelling reasons for national rules, including the pro-competitive benefits of a policy that allows competitors to serve the mass market, rather than disparate pockets of selected customers. In addition, the Department should consider the benefit of bright-line rules – particularly important as struggling CLECs attempt to secure funding to expand service – and the adverse impact on carriers and regulators of overly granular rules that must be constantly revisited. For each element, these considerations must be balanced against the benefit, relevance, and feasibility of a more granular approach. For some elements, such as transport, it may be feasible and not overly burdensome to consider impairment on a central-office by central-office approach; for most others, a granular analysis would be an enormous waste of resources. The *USTA* Court did not single out loop facilities for analysis on a more granular basis, for good reason: there simply are no relevant geographic variations for voice-grade copper loops or fiber-fed loops that would change the existing impairment analysis.

In sum, it is unnecessary for the Department to consider the *USTA* factors, but if it does, it should adopt a strong presumption that line sharing and packet switching issues be addressed based on national data, absent compelling evidence from Verizon of localized circumstances that would be material to the impairment analysis.

Thank you for your attention to this matter.

Very truly yours,

Christopher J. McDonald

cc (*by email & U.S. Mail*): D.T.E. 98-57-Phase III Service List